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Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

VETERANS AND RESERVISTS FOR PEACE IN VIETNAM,

Petitioner,

—against—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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REGIONAL COMMISSIONER OF CUSTOMS, REGION II and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered May 4, 1972.

Opinions Below

The opinions of the courts below have not been reported. The opinion of the district court is appended at page 20a and the opinion of the court of appeals is appended at page 7a.

Jurisdiction

The judgment sought to be reviewed was dated and entered May 4, 1972.

This Court has jurisdiction under 28 U.S.C. §1254(1).

Questions Presented for Review

1. Do the Foreign Assets Control Regulations, 31 C.F.R. Part 500, on their face and as applied, violate the First Amendment by prohibiting the receipt in the United States of unsolicited publications from China, North Korea and North Vietnam unless the addressee:

(a) undertakes the burden and suffers the delay of obtaining a license;

(b) submits for a permanent record his desire to receive publications from the proscribed countries; and

(c) assumes the burden of proving that he has made no payment?

2. Are the Foreign Assets Control Regulations, 31 C.F.R. Part 500, unconstitutional in granting, with no standard for its exercise, power to an administrative official to issue or deny licenses to receive unsolicited publications from China, North Korea and North Vietnam?

3. Are the Foreign Asset Control Regulations, 31 C.F.R. Part 500, authorized by 50 U.S.C. App. §5(b)?

4. If the Foreign Assets Control Regulations, 31 C.F.R. Part 500, are authorized by 50 U.S.C. App. §5(b), does that statute on its face and as applied violate the First and Fifth Amendments?

Constitutional Provisions, Statute and Regulations Involved

This case involves First and Fifth Amendments to the United States Constitution, and the Foreign Assets Control Regulations, 31 C.F.R. Part 500, promulgated by the Secretary of the Treasury under the authority of 50 U.S.C. App. 5(b). Pertinent portions of the statute and regulations are appended hereto at page 1a.

Statement of the Case[1]

Petitioner, an unincorporated association, received a notice from the Regional Commissioner of Customs, Region II, that material described as "(Booklet) Red Chinese Lit," sent to petitioner by mail from North Vietnam, had been detained and would be released only upon presentation of a license issued by Foreign Assets Control.[2]

The notice stated that application forms for such licenses could be obtained from the Foreign Assets Control Department, Federal Reserve Bank of New York, and that the detained mail would be returned to the sender in 45 days, but would be held an additional 45 days if the Regional Commissioner received a written communication that a license had been applied for.

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[1] The facts as stated herein are reflected in the opinion of the court of appeals which is found, *infra*, at p. 7a.

[2] Foreign Assets Control is an office in the Treasury Department which administers the Foreign Assets Control Regulations, 31 C.F.R. Part 500 ("Regulations"). The Regulations prohibit, unless licensed, every conceivable transaction involving North Vietnam and North Korea (and until recently, mainland China). A similar set of regulations is directed against Cuba, 31 C.F.R. Part 515.

The detained publications had been mailed to petitioner gratis and unsolicited. Subsequent inquiry disclosed that the publications consisted of copies of the "Vietnam Courier," an English language newspaper published in North Vietnam.

Petitioner, without applying for a license, commenced an action in the district court, seeking a declaratory judgment that the Regulations and 50 U.S.C. App. §5(b) ("Statute"), pursuant to which the Regulations were promulgated, were unconstitutional and also seeking injunctive relief. On cross motions for summary judgment the district court granted summary judgment to respondents, and the court of appeals affirmed.

Neither the notice of detention nor the application forms for licenses state the criteria or conditions for granting licenses, nor do they even indicate what the Regulations are or where they can be found. Two forms are available for license applications. These forms are included in the Appendix, *infra*, at pp. 24a *et seq.* One, TFAC-1, requires only the name, address, citizenship and nationality of the applicant and a description of the purpose of license sought. The other form, TFAC-4 is captioned "Application to import merchandise for non-commercial purposes" and consists of a two-page questionnaire relating to the applicant and the merchandise sought to be imported.

Because the detention involved unsolicited publications described incorrectly as "(Red) Chinese Lit.," and because petitioner had no knowledge that section 500.208 appendix item 108 of the Regulations authorizes the granting of licenses for publications if "the Office of Foreign Assets Control is satisfied that they are bona fide gifts," petitioner would have been unable to complete an application form

intelligibly except after correspondence to determine the nature of the detained material and the pertinent provision of the Regulations.

Reasons for Granting Writ

The decision of the court below, upholding the regulatory scheme by which the receipt of publications is made subject to licensing, runs contrary to four decades of unwavering decisions by this Court striking down prior restraints. See *Teague* v. *Regional Commissioner,* 394 U.S. 977 (1969) (Black and Douglas, JJ., dissenting from denial of certiorari). Whatever the limits of First Amendment doctine may be, the core of the constitutional protection is that no prior restraint may be imposed on speech or press. *Near* v. *Minnesota,* 283 U.S. 697 (1931). As recently as *New York Times Company* v. *United States,* 403 U.S. 713 (1971), this Court reiterated the rule that a heavy presumption of unconstitutionality faces any prior restraint.

It is no answer that the purpose of the licensing scheme is to promote a legitimate governmental interest, the prevention of economic benefit to the proscribed countries. It is indeed rare that a proper governmental interest cannot be found: the preservation of "secret" information, *New York Times Company* v. *United States, supra;* the prevention of violence, *Carroll* v. *Princess Anne,* 393 U.S. 175 (1968); the suppression of obscenity, *Freedman* v. *Maryland,* 380 U.S. 51 (1965).

The licensing scheme of the Regulations is particularly offensive: it imposes an impermissible burden on the recipient, it causes an undue delay in the delivery of protected publications, it requires the recipient to abandon his

anonymity in a sensitive political area, and it places the burden of proof upon the citizen to establish his right to read a newspaper.

A. *Burden and Delay.* In order to receive detained publications, the addressee must seek a license application form, complete it, mail it to the Federal Reserve Bank of New York, await a license, and then present the license to the Regional Commissioner of Customs. Because the publications in issue here were unsolicited, inquiry would also have to be made as to their nature. If, as is undoubtedly the case with the vast majority of addressees, they are unfamiliar with the Regulations, there would be further burden and delay in determining the crucial information that licenses will be issued for publications on proof that they are gifts. There is further delay while the application is processed. The court below expressed a view, supported by nothing in the record, that such delay would be inconsequential. In a similar case, *Teague* v. *Regional Commissioner,* 404 F.2d 441 (2d Cir. 1968), *cert. denied* 394 U.S. 977 (1969), the court concluded that Foreign Assets Control would process licenses in about ten days.

Because the publications are unsolicited, it will be indeed unlikely that any person will make the effort to apply for a license, any more than a citizen could be expected to apply for a license to receive a handbill if such a requirement could be imposed. Whatever the intent, the effect of the Regulations is exactly the same as a total prohibition.

This Court has consistently struck down legislation which imposes even modest delays on the exercise of First Amendment rights. *Freedman* v. *Maryland,* 380 U.S. 51

(1965); *Teitel Film Corp.* v. *Cusack,* 390 U.S. 139 (1968); *Carroll* v. *Princess Anne,* 393 U.S. 175 (1968). The court below suggested that administrative delay was tolerable because the agency considers only financial aspects of the transaction and not the content of the materials, *infra,* p. 17a. This distinction is unsupported by any authority. It would be shocking to relegate the detention of newspapers to a lower rung of the constitutional ladder than erotic films. See *Carroll* v. *Princess Anne, supra,* 393 U.S. at 182, where the Court ruled that the problem of timeliness is more acute in a case of "political" speech than it is in a case of erotic speech.

Lamont v. *Postmaster General,* 381 U.S. 301 (1965), which also dealt with the delivery of unsolicited publications, held flatly that a burden far less than required here—the checking of a box on a postage-free postcard—was an unconstitutional burden. The court below attempted to distinguish *Lamont* by relying on the statement in Mr. Justice Brennan's concurring opinion, 381 U.S. at 308-309, that in *Lamont* there was no compelling governmental interest in the regulatory scheme there in issue. But that statement was adopted by only two of the eight members of this Court who participated. The others declined to accept such a limitation.

B. *Loss of Anonymity.* Implicit in the licensing procedure is the maintaining of permanent files containing information about persons who have disclosed their wish for publications from what the court below referred to as the "enemy." The court below conceded the problem to be "troublesome," and went to the unusual length of indicating its wish that the records could be kept confidential.

Yet there is no assurance that any attempt is made to maintain secrecy, and in any case the records may be public within the meaning of the Freedom of Information Act, 5 U.S.C. §552(a)(2)(A). And they are undoubtedly subject to examination efforts by congressional committees and investigatory agencies.

The right to anonymity in political activity is fundamental. *Talley* v. *California,* 362 U.S. 60 (1960); *Zwickler* v. *Koota,* 389 U.S. 241 (1967); id., 290 F. Supp. 244 (E.D. N.Y. 1968), *reversed on other grounds sub nom. Zwickler* v. *Golden,* 394 U.S. 103 (1968); cf. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958). The passive recipient of publications is entitled to even greater protection than the publisher. Even if the likelihood of disclosure is not great, the fear of loss of anonymity is real, and is a deterrent to the exercise of fundamental rights. *Lamont* v. *Postmaster General, supra.*

C. *Burden of Proof.* The Regulations impose upon the applicant the burden of proving that the publications are in fact bona fide gifts. No such burden is permissible as a condition for the exercise of fundamental rights. *Speiser* v. *Randall,* 357 U.S. 513 (1958). This is a particularly compelling consideration because unlicensed payment for publications would be a felony. The Regulations require the citizen to prove he has not committed a crime.

The court below, in an exercise of wishful thinking, suggested that it should be sufficient if the applicant simply declare he has made no payment. At no time has the government indicated that Foreign Assets Control will accept such a statement, and the provision in the Regulations that Foreign Assets Control must be "satisfied" belies such a conclusion.

Where government action infringes upon basic rights, several factors must be considered. These include the nature of the governmental interest, the nature of the right infringed, and the availability of less drastic measures to achieve the same ends. *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Aptheker* v. *Rusk,* 378 U.S. 500, 512-514 (1964); *United States* v. *O'Brien,* 391 U.S. 367 (1968).

Whatever the governmental interest may be in restricting the flow of currency to North Vietnam and North Korea, it is patent that even completely unrestricted trade in films and publications would be *de minimis.* Thus there is no compelling necessity to impose a cumbersome licensing procedure on the importation of materials protected by the First Amendment.

But even if the government could establish that prohibition of payment for publications is essential, the end can be achieved by far less drastic means, utilizing the criminal penalties in the Statute.[3] Thus importation of publications could be permitted without restriction, but the making of any payment would remain a crime. Criminal sanctions are not, of course, a total deterrent, but they are deemed sufficient protection against a multitude of antisocial acts far more serious than the purchase of a Hanoi newspaper. If the threat of prosecution is an adequate sanction against treason, murder and larceny, there is no reasonable justification for a licensing requirement, in addition to severe criminal penalties, to prevent payment for North Vietnamese publications.

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[3] On the extent to which prior censorship, especially a pure administrative licensing scheme, is a more "drastic means" than subsequent criminal punishment, see, e.g., T. Emerson, *The System of Freedom of Expression,* p. 506 (1970); P. Freund, *The Supreme Court of the United States,* p. 66 (1968).

It is not necessary for petitioner to show that the regulation of importation of publications from North Vietnam is unreasonable. Where First Amendment rights are infringed the government bears the burden of justifying its acts. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 466 (1958); *Sherbert* v. *Verner,* 374 U.S. 398, 406-407 (1963).

It is not just the mechanics of the Regulations which offend the First Amendment. They suffer from the basic infirmity of lacking any standards by which Foreign Assets Control may determine whether or not to grant licenses. The Regulations grant power to the administrator to issue licenses for any reason whatever, and to deny a license to anyone who would be entitled to act under the provisions of one of the general exemptions contained in the Regulations. 31 C.F.R. §500.503. This would authorize Foreign Assets Control to deny a license for the importation of publications, even if it were proved that they were bona fide gifts. The Statute gives no hint of a congressional policy by which the administrator may be guided, for it simply permits limitless prohibition or regulation of transactions relating to "any property in which any foreign country or a national thereof has any interest."

The court below concluded that the Regulations were intended only to prevent economic benefit from flowing to the proscribed countries, despite the lack of any supporting language in the Regulations, the Statute or the enforcement history. It is well-established, however, that regulations which effect speech and press must be precisely and narrowly drawn and clearly authorized. *Schneider* v. *Smith,* 390 U.S. 17 (1968); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Kent* v. *Dulles,* 357 U.S. 116 (1958). The Regulations, in their grant of uncontrolled discretion, do not meet

that test. And it is doubtful that they have been authorized by the Statute. But if the Regulations are within the scope permitted by the Statute, it, too, must fall.

The accepted approach to such a problem, ignored by the court below, is to construe the Statute to save it from unconstitutionality. See, e.g., *N.L.R.B.* v. *Fruit and Vegetable Packers, Local 760,* 377 U.S. 58 (1964). There can be little doubt that the Statute, and therefore the Regulations, was intended to regulate commercial transactions only, and that any infringement of First Amendment rights is beyond their reach. By so construing the Statute, no substantial aspect of the program would be impeded, and fundamental rights would be preserved.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Statute and Regulations

50 U. S. C. App. §5(b), in pertinent part, provides:

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States;

* * * * *

Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; * * *.

The pertinent provisions of the Foreign Assets Control Regulations, 31 C. F. R. Part 500. are:

§500.201 *Transactions involving designated foreign countries or their nationals; effective date.* (a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumen-

tality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraphs (a) or (b) of this section is hereby prohibited.

(d) The term "designated foreign country" means * * * [China, North Korea and North Viet-Nam.]

§500.204. (a) Except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, or rulings, instructions, licenses, or otherwise, no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States if such merchandise is: (1) Merchandise the country of origin of which is China (except Formosa), North Korea, or North Viet-Nam. * * *

§500.204. Appendix.

(108) *Publications and films from China, North Korea and North Viet Nam.* Publications and films originating in mainland China, North Korea or North Viet Nam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. Publications and films originating in mainland China, North Korea, and North Viet Nam are also licensed without restrictions as to shipment or method of payment under programs approved by the Librarian of Congress or the National Science Foundation for universities, libraries, research and scientific institutions. Such publications and films are also licensed in exchange for publications from the United States. Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefits to designated countries or nationals thereof from the importations.

§500.503. The Secretary of the Treasury reserves the right to exclude from the operation of any license or from the privileges therein conferred or to restrict the applicability thereof with respect to particular persons, transactions or property or classes thereof. Such action shall be binding upon all persons receiving actual notice or constructive notice thereof.

§500.801. (a) • • •

(b) *Specific licenses*—(1) *General course of procedure.* Transactions subject to the prohibitions con-

tained in Subpart B of this part which are not authorized by general license may be effected only under specific license. The specific licensing activities of Foreign Assets Control are performed by the central organization and the Federal Reserve Bank of New York. When an unusual problem is presented, the proposed action is cleared with the Director of Foreign Assets Control or such person as he may designate.

(2) *Applications for specific licenses.* Applications for specific licenses to engage in any transaction prohibited by or pursuant to this chapter are to be filed in duplicate on Form TFAC-1 with the Federal Reserve Bank of New York. Any person having an interest in a transaction or proposed transaction may file an application for a license authorizing the effecting of such transaction, and there is no requirement that any other person having an interest in such transactions shall or should join in making or filing such application.

(3) *Information to be supplied.* Applicants must supply all information specified by the respective forms and instructions. Such documents as may be relevant shall be attached to each application as a part of such application except that documents previously filed with Foreign Assets Control may, where appropriate, be incorporated by reference. Applicants may be required to furnish such further information as is deemed necessary to a proper determination by the Control. If an applicant or other party in interest desires to present additional information or discuss or argue the application, he may do so at any time before or after decision. Arrangements for oral presentation should be made with the Control.

(4) *Effect of denial.* The denial of a license does not preclude the reopening of an application or the filing of a further application. The applicant or any other party in interest may at any time request explanation of the reasons for a denial by correspondence or personal interview.

(5) *Reports under specific licenses.* As a condition upon the issuance of any license, the licensee may be required to file reports with respect to the transaction covered by the license, in such form and at such times and places as may be prescribed in the license or otherwise.

(6) *Issuance of license.* Licenses will be issued by Foreign Assets Control acting on behalf of the Secretary of the Treasury or by the Federal Reserve Bank of New York, acting in accordance with such regulations, rulings and instructions as the Secretary of the Treasury or Foreign Assets Control may from time to time prescribe, in such cases or classes of cases as the Secretary of the Treasury or Foreign Assets Control may determine, or licenses may be issued by the Secretary of the Treasury acting directly or through any person, agency, or instrumentality designated by him.

Opinion of the United States Court of Appeals, Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1391

VETERANS AND RESERVISTS FOR PEACE IN VIETNAM,

Appellant,

—v.—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II AND SECRETARY OF THE TREASURY OF THE UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 21, 1972

Before ADAMS, GIBBONS, HUNTER, *Circuit Judges*

OPINION OF THE COURT

(Filed May 4, 1972)

ADAMS, *Circuit Judge.*

Plaintiff has frontally assaulted the Trading with the Enemy Act, 50 U.S.C. 5(b)[1] and the Foreign Assets

[1] Section 5(b) authorizes the President, in time of war or national emergency, to regulate or prohibit transactions "involving

Control Regulations, 31 C.F.R. Part 500[2] as being unconstitutional facially and as applied in this case. The attack is essentially two-pronged: the statute and regulations establish an unconstitutional delegation of legislative power without adequate standards, and violate the First Amendment by prohibiting the receipt of unsolicited publications unless the addressee obtains a license, submits

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any property in which any foreign country or a national thereof has an interest." This authority was delegated to the Secretary of the Treasury in 1942. 7 Fed. Reg. 1409 (February 12, 1942); Executive Order 9693 (July 6, 1942). The Secretary, in turn, has delegated his authority to the Director of the Office of Foreign Assets Control. Treas. Dept. Order No. 120, December 19, 1950, as amended, 32 Fed. Reg. 3472.

This country is currently in a state of national emergency. This emergency was first declared by President Truman on December 16, 1950, and was reaffirmed by Proclamation 3004, 67 Stat. C31, January 17, 1953. Subsequent Presidents have recognized the continued existence of this national emergency. Executive Order No. 10896, 3 C.F.R. (November 29, 1960); Executive Order No. 10905, 3 C.F.R. (January 14, 1961); Executive Order No. 11037, 3 C.F.R. (July 24, 1962); Executive Order No. 11387, 33 Fed. Reg. 47 (January 1, 1968). *See* Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966); Teague v. Regional Commissioner of Customs, 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969); Neilson v. Secretary of the Treasury, 424 F.2d 833 (D.C. Cir. 1970).

[2] Section 500.204(a) of the Foreign Assets Control Regulations prohibits unauthorized dealings in merchandise originating in, *inter alia*, North Vietnam. Paragraph 108 of the Appendix to Section 500.204 provides for licenses for the importation of films and publications from North Vietnam, North Korea and Communist China where such films or publications are bona fide gifts not involving "any direct or indirect commercial benefit to [the] designated countries," where payments for such items are made into blocked accounts, or where such materials are sent to libraries, universities, etc., or where they are received in "exchange for publications from the United States."

Section 500.801(b) sets forth the licensing procedure, and Section 500.803 provides that the Office of Foreign Assets Control or the Federal Reserve Bank of New York will make final decisions respecting applications for licenses.

to a permanent record his desire to receive the proscribed publications, and proves he has made no payment.

The facts of this controversy are not in dispute. By letter dated February 17, 1970, plaintiff, an unincorporated association, received notice from the Regional Commissioner of Customs that a shipment of Red Chinese literature from North Vietnam had been detained and would not be released until a license had been obtained. Plaintiff alleges that the publications, copies of an English language newspaper, were unsolicited and that plaintiff had no intention of making payment to anyone for them. However, rather than apply for a license, plaintiff brought suit in the district court for injunctive relief and moved for summary judgment, or in the alternative, for a preliminary injunction and the formation for a three-judge court under 28 U.S.C. §§2282, 2284 (1970). Defendants cross moved for summary judgment, and their motion was granted. The district court relied on Teague v. Regional Commissioner of Customs, 404 F.2d 441 (2d Cir. 1968), *cert. denied,* 394 U.S. 977 (1969).[2a]

I

Plaintiff's first argument is that the statute unconstitutionally delegates legislative powers without appropriate

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[2a] The district court denied the alternative relief on the ground that a substantial constitutional question had not been presented in view of the following cases: Kaufman v. Societe Internationale, 343 U.S. 156 (1952); Propper v. Clark, 337 U.S. 472 (1949); United States v. China Daily News, 224 F.2d 670 (2d Cir.), *cert. denied,* 350 U.S. 885 (1955); United States v. Quong, 303 F.2d 499 (6th Cir.), *cert. denied,* 371 U.S. 863 (1962); Sardino v. Federal Reserve Bank, *supra,* Teague v. Regional Commissioner of Customs, *supra.* We agree with this conclusion of the district court, but because the facts here differ somewhat from those present in *Teague,* we deem it necessary to set forth our reasoning in this opinion.

standards. In support of this contention, plaintiff has traced the history of predecessor statutes from the original Trading with the Enemy Act of 1917, 40 Stat. 414, to demonstrate that the present statute "permits profoundly drastic action at the whim of the administrator" that "may be [utilized] to carry out" domestic economic policy.[3] The only restriction on this vast power, plaintiff asserts, is that it can be exercised solely in time of war or other national emergency declared by the President, and since a President's declaration of national emergency is unreviewable,[4] "the statute contains no limitations whatsoever." Therefore, according to plaintiff, the statutory grant of authority is repugnant to the Constitution, A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 485 (1935), especially where the overbreadth of the statute affects First Amendment rights. United States v. Robel, 389 U.S. 258 (1967).

We note that the statute contains two express limitations: (1) it becomes operative only during "the time of war" or "any other period of national emergency declared by the President," and (2) it applies only to "property in which any foreign country or a national thereof has any interest." Ordinarily, when dealing with matters of foreign relations, Congress may lawfully delegate to the President broader discretion than would be permissible with regard to domestic affairs. Zemel v. Rusk, 381 U.S. 1 (1965);

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[3] However, there is nothing in this case to indicate that the statute had been utilized other than in connection with foreign relations.

[4] *See* Teague v. Regional Commissioner of Customs, 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969); Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966), *cert. denied*, 385 U.S. 898 (1968).

Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). Were the standards expressed in these cases the only criteria of relevance here, we would have no difficulty holding that the delegation does not render the statute unconstitutional, especially since the national emergency qualifies as a "time of crisis."

But the matter is not that simple. Clearly, items entitled to First Amendment protection may be encompassed within the definition of the term "property." When the operation of an otherwise valid law "clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restrictions on freedom can be tolerated." United States v. Robel, 389 U.S. at 264. In deciding "whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal" it is "necessary to measure the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment." *Id.* at 268 n.20. Thus there are two essential criteria: (1) the legislative purpose must be legitimate, and (2) the means of achieving that purpose must not violate the First Amendment.

There is little doubt regarding the propriety of the purpose of the Trading with the Enemy Act. Its obvious goal is to prevent countries such as North Vietnam and Communist China from deriving any economic benefit from transactions with persons subject to the jurisdiction of the United States. Considering the state of our relationship with North Vietnam, and that money is an important weapon in any international struggle, we conclude that the Congressional design under-pinning the Act is wholly

proper. *See* Banco National de Cuba v. Sabbatino, 376 U.S. 398 (1964); Teague v. Regional Commissioner of Customs, *supra;* Sardino v. Federal Reserve Bank of New York, *supra.*

The question whether the means adopted by Congress to reach its goal—delegation of authority to promulgate regulations—comport with the First Amendment does not admit to facile solution. Most, if not all, of the authoritative Supreme Court cases dealing with this issue concern instances of delegation of authority where the function of the delegatee was to determine only whether certain materials were protected by the First Amendment. *See e.g.,* United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); Blount v. Rizzi, 400 U.S. 410 (1971); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968); Freedman v. Maryland, 380 U.S. 51 (1965).[5] However, none of those cases involved the precise problem confronting us: whether Congress may delegate authority to regulate so broad that the regulation of First Amendment protected rights incidentally falls within the ambit of the authority.

In other contexts, though, the Supreme Court has validated statutes and ordinances regulating various activities although such regulation incidentally curtailed First Amendment rights. In Valentine v. Chrestensen, 316 U.S. 52 (1942), the Supreme Court upheld an anti-littering ordinance directed against advertising handbills despite the fact that the handbills also contained materials pro-

[5] Similarly, in *Robel, supra,* the key to the decision was that the operative effect of the statute there invalidated depended upon "the exercise of an individual's right of association, which is protected by the provisions of the First Amendment." 389 U.S. at 263. (footnote omitted).

tected by the First Amendment.[6] And in American Communications Assn. v. Douds, 339 U.S. 382 (1950), the Supreme Court explained:

> "Those, who, so Congress has found, would subvert the public interest cannot escape all regulation because, at the same time, they carry on legitimate public activities." *Id.* at 412.

Adderly v. Florida, 385 U.S. 39 (1966), indicated that a state could nondiscriminately deny to demonstrators access to its property, provided such denial was "even-handed." *Id.* at 47-48.[7] An antipicketing statute was held valid and not overly broad in Cameron v. Johnson, 390 U.S. 611 (1968), since it did not prohibit picketing unless it obstructed or unreasonably interfered with ingress or egress to or from a courthouse, and there was no disclosure in the record that the officials had acted in bad faith or that the statute was enacted to halt the appellants' picketing.

The essence of these cases is that a statute is not overly broad and thus violative of the First Amendment merely because it regulates incident to its scheme protected activities or property. It is only where the statute *directly*

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[6] *See also,* Williamson v. Lee Optical Co., 348 U.S. 483 (1955). In that case, the Supreme Court upheld a statute which made it unlawful to solicit the sale of eyeglasses by use of the advertising media.

[7] *See also,* Kovacs v. Cooper, 336 U.S. 77 (1949), where the Supreme Court upheld an ordinance prohibiting the use of sound trucks in the public streets. Mr. Justice Frankfurter's concurring opinion stressed that the ordinance applied to the medium and not to the content of the message.

Cammarano v. United States, 358 U.S. 498 (1959) upheld, in the face of a First Amendment challenge, the validity of a treasury regulation applied so as to deny a deduction for ordinary and necessary business expense contributions to a lobbying organization.

regulates speech or expression arguably protected by the First Amendment, or where as its mechanism the statute has granted discretion to a delegatee to determine whether particular items of expression may be prohibited on the basis of their content, that the question of overbreadth arises. Section 5(b) does not directly regulate First Amendment protected material, rather it controls transactions concerning property in which an enemy has an economic interest. The purport of the statute is clear on its face, and therefore provides guidance to the delegatee with regard to the exercise of his functions. Were Section 5(b) applied by the President or his delegatee in such fashion that only First Amendment materials were excluded or regulated, we would have the power to construe that statute in a manner which would avoid the Constitutional defect. United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1972). However, that case is not before us, and therefor we need not so interpret the legislation now.[8] Even if the Act were subject to an overly broad construction, such would not preclude its application "to prior conduct foreseeably within its valid sweep." *Id.* at 375 n.3.

II

Plaintiff next assails the statute and regulations with the charge that the regulatory scheme constitutes a prior restraint on its First Amendment freedoms. Here, using

[8] There is a serious question whether plaintiff has the standing necessary to raise the argument that the statute is void for overbreadth because it might be utilized only to restrict access to materials protected by the First Amendment. *See* Mr. Justice Harlan's concurring opinion in *Thirty-Seven Photographs*, 402 U.S. at 377-378, in which he further articulates the reasoning of the court in Section II of the majority opinion.

Lamont v. Postmaster General, 381 U.S. 301 (1965), as ammunition, plaintiff trains its weapons on the licensing procedure. This procedure, it is contended, encompasses all of the vices which rendered the statutory scheme at issue in *Lamont* invalid in that: (1) it imposes the burden on recipients of undertaking the affirmative act of completing a questionnaire and awaiting the delay of administrative process before the materials may be released; (2) it grants unlimited discretion to refuse licenses to the Office of Foreign Assets Control; (3) the filing of an application for a license results in a loss of anonymity because a permanent public record is thereby created; and (4) the procedure improperly places the burden of proof that a license is warranted upon the applicant.

But the *Lamont* case is not as broad as plaintiff asserts. As the concurring opinion points out:

> "[W]e 'have consistently held that only a compelling [governmental] interest in the regulation of a subject within [governmental] constitutional power to regulate can justify limiting First Amendment freedom.' *NAACP* v. *Button*, 371 U.S. 415, 438. The Government's brief expressly disavows any support for this statute 'in large public interests such as would be needed to justify a true restriction upon freedom of expression or inquiry.'" 381 U.S. at 308-309.

Here, as discussed in Section I, *supra*, the Government has a compelling interest in regulating the flow of money to certain countries. And because plaintiff has not alleged —indeed, with regard to the posture of the case as plaintiff fashioned it, could not allege—that the Office of Foreign Assets Control has acted in bad faith, we must assume that

the responsible officials will carry out their duties in accordance with constitutionally acceptable standards. It is in light of these factors that the licensing scheme must be evaluated.

A. Burden and Delay

In order to obtain a license, the applicant must submit either of two forms: TFAC-1 or TFAC-4. The first form applies solely to commercial importations, and since the importation here is not commercial, that form need not be further considered. Form TFAC-4, which applies to non-commercial importation, is rather brief. It requests only the following information: (1) the applicant's name, address and occupation; (2) the description and value of the merchandise; (3) the details of purchase, if the merchandise was purchased; (4) whether the applicant paid or intends to pay for the materials, and if so, how much and to whom; (5) if the merchandise was purchased or ordered, whether the applicant had knowledge of the Foreign Assets Control Regulations; (6) the use to be made of the materials; (7) whether the applicant has ever applied for such a license in the past. In view of the great importance in assuring that United States currency does not fall into the wrong hands, we do not believe that the burden imposed by answering the interrogatories on this form are unreasonable or excessive.

With regard to delay, we observe that the Notice of Detention contemplates 45 days, which may be extended to a maximum of ninety days. Because plaintiff did not request a license, we do not know exactly how long the administrative process takes, but if the Office of Foreign Assets Control expedites applications for licenses for materials protected by the First Amendment, it does not ap-

pear that this delay will be unduly burdensome. Because the administrative determinations go only to the factual questions regarding the financial aspects of the transaction and not to a decision based on the contents of the materials, this delay would not appear to be extraordinarily lengthy. *See Thirty-Seven Photographs,* 402 U.S. at 373.

B. Unlimited Discretion

It does not seem that the regulations vest unlimited discretion in the Government to deny a license. The whole thrust of the Act and regulations is to ensure that certain countries do not achieve economic benefit from transactions involving persons subject to the jurisdiction of the United States. If the Office of Foreign Assets Control attempted to apply any other standard, its actions might well be unconstitutional. *See* Kent v. Dulles, 357 U.S. 116 (1958), *cf.* United States v. Thirty-Seven Photographs, *supra;* Lamont v. Postmaster General, *supra.* But such a case is not now before us, and we hold here only that so long as the Government applies the standards implicit in the Act and regulations, the discretion vested in the Office of Foreign Assets Control is not so broad as to be unconstitutional.

C. Loss of Anonymity

We find troublesome the loss of anonymity accompanying the maintenance of records regarding the importation of First Amendment materials. *See Lamont, supra.* However, the necessity to maintain records of this sort appears to be an important adjunct to the adequate control and regulation of the flow of cash to certain countries. Such records enable the Office of Foreign Assets Control to check the prior importation of materials from the enumerated

countries by individual applicants, and perhaps facilitate the detection of patterns of conduct indicative of violations of the act. Where there is a need to regulate, it is essential to record the regulatory activity. We hesitate to invalidate such requirement without allegations or proof that the purpose of the recordation is to embarrass the recipient of materials or to chill the exercise of his right to receive them. Our disquietude would be considerably ameliorated if the Office of Foreign Assets Control would keep their records confidential so as to lessen the impact that may be caused by the retention of such documents.

D. Burden of Proof

The Notice of Detention received by plaintiff stated, with regard to license applications, that:

> "Such applications are, however, normally granted only if they are supported by clear and complete documentary proof of the non-Chinese origin of the merchandise affected by the Regulations. • • • It should be noted that the Foreign Assets Control does not regard statements of sellers or shippers (or documents based thereon) as affording a basis for issuing licenses."

Here, there is no dispute regarding the country of origin of the merchandise. Rather, in this case, the only inquiry which would be before the Office of Foreign Assets Control would be whether payment would be made, if at all, in such manner that the funds would be likely to be available to the listed countries. In this respect, and in the context of this case, Form TFAC-4 asks only: "Did the applicant pay or does he intend to pay for this merchandise, directly or indirectly • • • ?" The simple answer "No", followed

by the certification of truth printed on the form and the applicant's signature would satisfy the Act and regulations and thereby mandate that the materials be released, unless the Office of Foreign Assets Control possessed contrary information from another source. This duty does not appear to be excessively onerous, and in the absence of proof that a more convincing showing is required by the Government, we cannot hold that the burden is so high as to render the Act and regulations unconstitutional as applied.[9]

III

For the reasons stated in Sections I and II, we hold with regard to the facts of this case that Section 5(b) of the Trading with the Enemy Act and Part 500 of the Foreign Assets Control Regulations are Constitutional both facially and as applied.

Accordingly, the order of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[9] Had the plaintiff applied for a license, and in such application, answered the question in the negative, and were such application then denied, with or without a hearing or statement of reasons, we would be faced with different Constitutional questions that we need not now resolve.

Opinion of the United States District Court, Eastern District of Pennsylvania

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 70-1598

VETERANS AND RESERVISTS FOR PEACE IN VIETNAM,

—v.—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II AND SECRETARY OF THE TREASURY OF THE UNITED STATES.

MEMORANDUM OPINION

WEINER, J. February 2, 1971

In this case court proceedings were launched against the defendant arising out of the following facts. On February 17, 1970, the Regional Commissioner of Customs notified the plaintiff that a package containing printed matter, published in and forwarded from North Vietnam, was being detained and would not be released and delivered unless plaintiff applied for and procured a license from Foreign Assets Control. The Commissioner relied on the Trading with the Enemy Act §5(b) 50 U.S.C. App. (1964) and the regulation 31 C.F.R. §500.808 (1968) promulgated thereunder.

The plaintiff, thereupon, brought this action seeking injunctive relief on the ground that the Statute and Regula-

tion are repugnant to the Constitution of the United States. We now have for our consideration counter motions for summary judgment together with the plaintiff's request for the appointment of a three-judge court.

This case presents a fact situation identical in all material respects to that present in *Teague* v. *Regional Commissioner of Customs, Region II*, 404 F.2d 441 (1968), cert. denied, 385 U.S. 898 (1966). The Court's analysis of the legislative history and the state of the law on this subject is persuasive and need not be reiterated here. We are in complete accord and believe that the closing words of that opinion are worth repeating.

"The Supreme Court has recently said:

> This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U.S. 367, 376-377, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968).

> "Applying the Supreme Court's test here we conclude that the infringement of first amendment freedoms is permissible as incidental to the proper, important, and substantial general purpose of the regulations." 404 F.2d at 446.

Additionally the plaintiff has moved for the convening of a three-judge court pursuant to 28 U.S.C. §§2282 and 2284. To justify the convening of a three-judge court the constitutional issues raised must be substantial. "The lack of substantiality in a federal question may appear either because it is without merit or because its unsoundness so clearly results from previous decisions of the Supreme Court as to foreclose the subject." *California Water Service Co.* v. *City of Redding, California,* 304 U.S. 252, 255, 58 S.Ct. 865, 82 L.Ed. 1321 (1938). Thus if the plaintiff's challenge to the Constitutionality of the Statute, i.e., the Trading with the Enemy Act, would be a decision of first impression, we would conclude that the request for the appointment of a three-judge court would be warranted. However, in a long line of decisions the constitutionality of the Statute in the case sub judice has been upheld. See: *Kaufman* v. *Societe Internationale,* 343 U.S. 156 (1952); *Zittman* v. *McGrath,* 341 U.S. 471 (1951); *Propper* v. *Clark,* 337 U.S. 472 (1949); (World War II era controls). Cf. *United States* v. *China Daily News,* 224 F.2d 670 (2d Cir. 1955) cert. denied 350 U.S. 885 (1955); *United States* v. *Quong,* 303 F.2d 499 (6th Cir. 1962) cert. denied 371 U.S. 863 (1962); (Korean conflict); *Sardino* v. *Federal Reserve Bank,* 361 F.2d 106 (2d Cir. 1966) cert. denied 385 U.S. 898 (1966); *Teague* v. *Regional Commissioner of Customs, Region II,* supra (Vietnam). It appears apparent that the constitutionality of the Statute has been well established.

The restrictions placed upon us by prior decisions leaves no recourse in this Court other than to deny the request for the convening of a three-judge court to rule upon the constitutionality of a regulation adopted pursuant to an Act of Congress. This obligation rests upon a single judge. *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939).

ORDER

The plaintiff's motions for summary judgment and the convening of a three-Judge Court are DENIED.

The defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

CHARLES P. WEINER,
J.

Form TF-NC-1
Treasury Department
Foreign Assets Control

Application No. _____
(For Treasury Use Only)

PLEASE PRINT OR TYPE

APPLICATION FOR A LICENSE *

(To be executed and filed IN DUPLICATE with Federal Reserve Bank of New York, Foreign Assets Control Division, 33 Liberty Street, New York, New York 10045.) Attachments to applications, including any correspondence, should also be submitted IN DUPLICATE.

TO THE SECRETARY OF THE TREASURY
c/o Federal Reserve Bank of New York
Foreign Assets Control Division
33 Liberty Street
New York, N. Y. 10045

Date _____

Sir:

In accordance with Chapter V, Subtitle B, of Title 31 of the Code of Federal Regulations, the undersigned hereby applies for a license to execute the transaction described below:

A. (1) The name of the applicant is _____

(2) Applicant resides at or, in the case of a corporation, partnership, association or other organization, has its principal place of business at :

_____
(Street) (City) (State) (ZIP Code No.) (Country)

(3) Applicant is and has been a citizen of _____

since _____
(Month) (Day) (Year)

(4) The nationality under Chapter V, Subtitle B, of Title 31 of the Code of Federal Regulations ** of the applicant is _____

(5) Since _____ the applicant has been engaged in the business of _____
(State nature of business)

B. The applicant desires a license in order to:

(State in detail the nature, purpose and amount of the transaction, and the name, address, nationality under Chapter V, Subtitle B of Title 31 of the Code of Federal Regulations ** and extent of interest of every person, including the applicant, involved or interested in the transaction.)

Applicant's No.

* All definitions appearing in Chapter V, Subtitle B of Title 31 of the Code of Federal Regulations shall apply to the terms employed herein.

** In the case of a corporation, partnership, or association, give country in which organized and indicate the approximate percentage of stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of such organization owned or controlled, directly or indirectly, by designated nationals.

C. The applicant represents and warrants that, except as specifically stated below, no person other than those mentioned in item B above has any interest, direct or indirect, in the transaction or transactions for which a license is applied for herein.

D. The applicant represents and warrants that, except as specifically stated, he has personal knowledge of all the facts herein stated; that the same are correct and true; and that he does not have knowledge of any material fact in connection with such application which is not fully and accurately set forth herein.

E. The applicant represents and warrants that he has complied, and agrees that he will comply, in all respects, with all provisions of section 3(a) of the Trading with the enemy Act, as amended, and all regulations, rulings, orders and instructions issued by the Secretary of the Treasury thereunder or under the authority of section 5(b) of the Trading with the enemy Act, as amended, and with any and all licenses issued to the applicant pursuant thereto.

F. The applicant represents and warrants that no other application for a license authorizing the transaction here involved has been filed or is pending, except as follows:

_____
(Signature of Applicant)

(If this application is filed by an agent, attorney, or other person, for or on behalf of the applicant, the following statement should be executed.)

I, _____, certify that I am the _____
(State relationship to applicant)
of _____ who is the applicant in the above application for a license;
(Name of Applicant)

that I am duly authorized to make the foregoing application on behalf of the applicant; that, except as otherwise specifically stated, I have personal knowledge of all the facts herein stated; that the same are true and correct; and that I do not have knowledge of any material facts in connection with said application which are not fully and accurately set forth herein.

_____
(Signature of Agent)

_____
(Address)

RECOMMENDATION OF FEDERAL RESERVE BANK

The above application is forwarded to the Secretary of the Treasury with the recommendation that a license should be (granted) (denied).

Remarks: _____

NOTE: If this application is executed outside of the United States, it must be executed under oath before a diplomatic or consular officer of the United States.

Attention is directed to Title 18 U.S.C. Section 1001, which provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Copies of this form may be obtained at any Federal Reserve Bank or from the Foreign Assets Control, Treasury Department, Washington, D. C.

PLEASE PRINT OR TYPE

FORM TFAC-4 (Rev. 4)
Treasury Department
Foreign Assets Control

Application No. _____
(For Treasury Use Only)

APPLICATION TO IMPORT MERCHANDISE FOR NON-COMMERCIAL PURPOSES

This form should be executed and filed in duplicate with Foreign Assets Control, Federal Reserve Bank of New York, 33 Liberty Street, New York, N. Y. 10045. USE FORM TFAC-1 FOR COMMERCIAL IMPORTATIONS. Copies of Forms TFAC-1 and TFAC-4 may be obtained from any Federal Reserve Bank or from the Foreign Assets Control, Treasury Department, Washington, D. C. 20220.

TO THE SECRETARY OF THE TREASURY
c/o Federal Reserve Bank of New York

Date _____

Sir:

In accordance with the Foreign Assets Control Regulations (Chapter V, Subtitle B, of Title 31 of the Code of Federal Regulations), the undersigned hereby applies for a license authorizing the importation or release from Customs custody of the merchandise described below.

1. Applicant's:

   (a) Name _____

   (b) Address _____
   (Street) (City) (State) (ZIP Code)

   (c) Occupation _____

2. (a) Describe the merchandise and give its present location. (If Customs notice of detention received, submit copy). _____

   _____

   _____

   (b) What is the US dollar value of the merchandise? _____

3. (a) Where was merchandise purchased? _____

   _____

   (b) Name and address of purchaser. _____

   (c) Was merchandise purchased during foreign travel? _____

(Over)

(d) Was merchandise ordered by mail? If so, from whom? _____

_____

(e) Name and address of seller. If unknown, name and address of shipper of merchandise. _____

_____

4. Did the applicant pay or does he intend to pay for this merchandise, directly or indirectly, and if so when, how and how much? _____

_____

5. If the merchandise was purchased or ordered by the applicant, what knowledge of the Foreign Assets Control Regulations did the applicant have at the time the merchandise was purchased or ordered? _____

_____

6. What use will be made of this merchandise? (Personal use, resale, etc.) _____

_____

7. Has the applicant or any member of his immediate family ever applied for a Foreign Assets Control license? If so, give, with respect to each application, its number and date, and the name of the applicant. _____

_____

I certify that the above statements are true to the best of my knowledge and belief.

_____
(Applicant's Signature)

NOTE: If the space on this form is inadequate for you to state any required information, it should be set forth on a page, or pages, securely attached to this form.

Attention is directed to Title 18 U. S. C. Section 1001, which provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-81

VETERANS AND RESERVISTS FOR PEACE IN VIETNAM, PETITIONER

v.

REGIONAL COMMISSIONER OF CUSTOMS, REGION II, AND SECRETARY OF THE TREASURY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a–19a) is reported at 459 F. 2d 676. The opinion of the district court (Pet. App. 20a–23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered May 4, 1972. The petition for a writ of certiorari was filed July 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory and regulatory licensing system applicable in time of war or national emergency to transactions involving the importation of property from a hostile country (North Vietnam) constitutes an impermissible interference with the First Amendment if the property in question consists of unsolicited foreign publications.

2. Whether the Trading with the Enemy Act is unconstitutionally overbroad.

STATUTE AND REGULATIONS INVOLVED

The Trading with the Enemy Act, 50 U.S.C. App. 5(b), is set forth in relevant part at Pet. App. 1a. The Foreign Assets Control Regulations, 31 C.F.R. Part 500, are set forth in pertinent part at Pet. App. 2a–6a.

STATEMENT

The material facts in this case are not disputed. By letter dated February 17, 1970, petitioner, an unincorporated association, was notified that a package of literature from Hanoi, North Vietnam, addressed to it, was being detained by customs authorities.[1] It would be released, the letter advised, upon petitioner's presentation of either a certificate of origin—stating that the materials did not originate from, and were not manufactured in, North Vietnam or Mainland China—or a Foreign Assets Control License, which was obtainable within 90

[1]The package was sent by "Ubavanhoa," the principal propaganda organization for the North Vietnamese Government.

days of notification on application to the Federal Reserve Bank of New York (see Pet. App. 24a–27a).

Petitioner, rather than invoking the available administrative procedures to obtain the literature, commenced this civil suit in the United States District Court for the Eastern District of Pennsylvania, seeking both declaratory and injunctive relief. It claimed that the Trading with the Enemy Act, 50 U.S.C. App. 5(b),[2] and the Foreign Assets Control Regulations promulgated thereunder, 31 C.F.R. Part 500,[3] estab-

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[2] Section 5(b) of the Act authorizes the President, in time of war or national emergency, to regulate or prohibit transactions "involving, any property in which any foreign country or a national thereof has an interest." In May 1964, North Vietnam was added to the list of hostile countries, the property of which was subject to regulation. 31 C.F.R. 500.201. Mainland China and North Korea, both of which were on the list of designated hostile countries when this suit was commenced, have recently been removed from the list.

That the United States is currently in a state of national emergency was most recently reaffirmed by President Johnson in January 1968 (E.O. 11387, 33 Fed. Reg. 47).

[3] Section 500.204(a) of the regulations prohibits unauthorized dealings in merchandise originating in North Vietnam and elsewhere. Licenses for the importation of films and publications from North Vietnam are obtainable if such materials are *bona fide* gifts not involving "any direct or indirect * * * commercial benefit to [the] designated countries," are paid for by making payments into blocked accounts, are sent to libraries, universities or research and scientific institutions, or are received in "exchange for publications from the United States." 31 C.F.R. 500.204 App. ¶ 108.

The licensing procedures are set forth in Section 500.801(b) of the regulations. Final decisions on license applications are made by the Treasury Department Office of Foreign Assets Control or by the Federal Reserve Bank of New York. 31 C.F.R. 500.803.

lish an unconstitutional delegation of legislative power and, insofar as they regulate receipt of unsolicited publications, constitute an unwarranted infringement of First Amendment freedom of speech.

Following a hearing on cross-motions for summary judgment and on petitioner's request for the convening of a three-judge court, the district court granted respondents' summary judgment motion. Finding this case virtually indistinguishable from *Teague* v. *Regional Commissioner of Customs*, 404 F. 2d 441 (C.A. 2), certiorari denied, 394 U.S. 977, the court concluded (Pet. App. 21a–22a) that here, as in *Teague*, the possible incidental interference with First Amendment freedoms that might result from enforcement of the statute and regulations was on balance permissible in view of the overriding legislative purpose served by the licensing requirement. This determination could properly be made by a single judge, the court held (Pet. App. 22a), because "in a long line of decisions the constitutionality of the Statute in the case sub judice has been upheld." The court of appeals affirmed (Pet. App. 7a–19a).

ARGUMENT

1. Petitioner casts its arguments in this Court essentially on First Amendment grounds, asserting that the foreign assets licensing system imposes an impermissible prior restraint on speech and press freedoms where, as here, the property shipped into the United States is unsolicited literature. It places principal reliance on this Court's decision in *Lamont* v. *Postmaster General*, 381 U.S. 301.

Lamont also involved the regulation of unsolicited foreign publications mailed to this country from abroad. But the statute that was declared unconstitutional in that case, the Postal Service and Federal Employees Salary Act of 1962, 39 U.S.C. (1964 ed.) 4008(a), was by its terms materially different from the Trading with the Enemy Act that is being challenged here. The former statute specifically provided for the retention by postal authorities of all "[m]ail matter * * * which originates or which is printed or otherwise prepared in a foreign country" if the Secretary of the Treasury had determined that it was "'communist political propaganda'"; the delivery of such mail was conditioned upon the written request of the addressee. See 39 U.S.C. (1964 ed.) 4008(a). This procedure, the Court concluded in *Lamont* (381 U.S. at 306), was enacted by Congress to permit "federal agencies [to] regulate the flow of mail." The Act focused on literature and assigned governmental officials the responsibility for monitoring the ideological content of the publication. In speaking to the legislative purpose, the Court stated (*ibid*): "The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail." So direct an interference with the free flow of ideas to the public, it was held (381 U.S. at 307), "amounts * * * to an unconstitutional abridgment of the addressee's First Amendment rights." There was concededly no support for the statute "'in large public interests such as would be needed to justify a true

restriction upon freedom of expression or inquiry' " (381 U.S. at 309; Mr. Justice Brennan, concurring).

The present statutory and regulatory licensing system is poles apart. The Trading with the Enemy Act, and the licensing regulations promulgated under it, reflect a legitimate governmental purpose involving substantial public interests. They are aimed not at literature *per se* or "communist propaganda" from abroad, but, as noted below (Pet. App. 14a), at all transactions "concerning property in which an enemy has an economic interest." Thus, their focus is constitutionally neutral, and they apply only incidentally to publications. The legislative purpose in regulating such transactions is to restrict the flow of American dollars to a few specified hostile nations (see n. 2, p. 3, *supra*) in return for merchandise shipped from such countries. As the court of appeals stated (Pet. App. 11a–12a):

> There is little doubt regarding the propriety of the purpose of the Trading with the Enemy Act. Its obvious goal is to prevent countries such as North Vietnam and Communist China from deriving any economic benefit from transactions with persons subject to the jurisdiction of the United States. Considering the state of our relationship with North Vietnam, and that money is an important weapon in any international struggle, we conclude that the Congressional design under-pinning the Act is wholly proper. * * *[4]

[4] See also *Banco National de Cuba* v. *Sabbatino*, 376 U.S. 398, 412; *Teague* v. *Regional Commissioner of Customs*, *supra*; *Sardino* v. *Federal Reserve Bank of New York*, 361 F.2d 106 (C.A. 2), certiorari denied, 385 U.S. 898.

We do not dispute that where, as here, packages shipped to this country from North Vietnam contain publications originating in that country, First Amendment interests are implicated. See *Kleindienst* v. *Mandel,* No. 71–16, decided June 29, 1972, slip op. 9–12.[5] But the licensing procedures required by the statute and regulations involved in this case are not concerned with the content of the package; their purpose is not to restrict the flow of information or ideas. To the extent that they affect the exercise of First Amendment freedoms, the intrusion is, unlike *Lamont,*[6] "only incidental to the proper general purpose of the regulations: restricting the dollar flow to hostile nations." *Teague* v. *Regional Commissioner of Customs, supra,* 404 F.2d. at 445. Nor is there any censorship of selected materials; as pointed out in *Teague* (*ibid.*), "all publications from the specified nations are treated alike. 31 C.F.R. § 500. 204 App. ¶ 108 (1968)."[7]

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[5] As this Court made clear in *Mandel* (slip op. 9), the nonresident alien addressor of the package has no constitutional rights protected under the First Amendment. The only rights to free speech and press that are at all involved here are those of the American addressee.

[6] See Mr. Justice Brennan's concurring opinion in *Lamont* v. *Postmaster General, supra,* 381 U.S. at 308–309; and see *Zemel* v. *Rusk,* 381 U.S. 1, 16–17.

[7] The regulation is set forth at Pet. App. 4a. As the court below pointed out (Pet. App. 17a), the administrative determinations regarding approvals of license applications for receipt of foreign films or publications "go only to the factual questions regarding the financial aspects of the transaction and not to a decision based on the contents of the material."

In *United States* v. *O'Brien,* 391 U.S. 367, 376–377, this Court stated:

> * * * This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. * * * [W]e think it clear that a Government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. * * *

That is the test to be applied here. See *Teague* v. *Regional Commission of Customs, supra,* 404 F.2d at 446. We think that the court of appeals struck the proper balance in declaring that the claimed infringement on the free flow of information in this case is permissible as incidental to the proper, important, and substantial "nonspeech" purpose of the statute and the regulations.

Petitioner's argument to the contrary is not based on an assertion that the license requirement prevents it from receiving the publications from North Vietnam. As we have already noted, the Foreign Assets Control regulations specifically provide for the release to the addressee of all films and publications from that country if the payments for them are made to blocked accounts or if the material is sent as *"bona*

fide gifts to the importers * * *" (31 C.F.R. 500.204 App. ¶ 108 (emphasis supplied); Pet. App. 4a). And the publications are available at "universities, libraries, [and] research and scientific institutions" (*ibid.*), which are permitted to receive them without restriction as to payment.

Petitioner's First Amendment claim rests essentially on the alleged burdens and delays that it speculates inhere in the processing of the license application.[8] Since petitioner never applied for a license, it

[8] Petitioner also objects to the "licensing procedure" as an infringement of its right to anonymity. Anonymity, however, is not in itself a constitutional right; a citizen is entitled under the First Amendment to resist compelled disclosure of his identity when there exists a direct link between his identification and the content of his speech or writings. But where speech and press freedoms are not directly involved, the First Amendment does not guarantee anonymity. That is the case here. Just as the recipient of a package of cloth from North Vietnam would not be in a position to refuse on First Amendment grounds to comply with the licensing procedures for fear of "loss of anonymity," so, too, petitioner should not be able to invoke such an argument simply because its package contained unsolicited publications. It is not being asked to disclose its identity because of its personal views, opinions or expressions. There have been no "allegations or proof that the purpose of the recordation is to embarrass the recipient of materials or to chill the exercise of his right to receive them" (Pet. App. 18a).

Rather, as the court of appeals stated (Pet. App. 17a-18a), "the necessity to maintain records of this sort appears to be an important adjunct to the adequate control and regulation of the flow of cash to certain countries. Such records enable the Office of Foreign Assets Control to check the prior importation of materials from the enumerated countries by individual applicants, and perhaps facilitate the detection of patterns of conduct indicative of violations of the act. Where there is a need to regulate, it is essential to record the regulatory activity."

is questionable whether petitioner is now in a position to complain on this ground; the only delay involved in this case has resulted from the association's own decision to institute the present action rather than invoke the administrative process.

In any event, the court below correctly determined that the "burden" imposed by filling out the application is not "unreasonable or excessive" (Pet. App. 16a), and that the delay in processing the application "would not appear to be extraordinarily lengthy" (Pet. App. 17a). "The only delay", as pointed out in *Teague* v. *Regional Commissioner of Customs, supra,* 404 F.2d at 446, "is that required to determine that money is not being sent to one of the designated nations * * *"; that determination can be made quickly.[9]

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[9] In *Teague* v. *Regional Commissioner of Customs, supra,* 404 F.2d at 446, the Second Circuit noted: "The district court found that a license application can typically be processed within 10 days." Unlike *Freedman* v. *Maryland,* 380 U.S. 51, on which petitioner places heavy reliance, there is no inquiry here into the content of the detained materials. Compare *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363.

Contrary to petitioner's speculation, the applicant is not put to a difficult burden of proof by the licensing procedure. For example, as noted by the court below (Pet. App. 18a), "in this case, the only inquiry which would be before the Office of Foreign Assets Control would be whether payments would be made, if at all, in such a manner that the funds would be likely to be available to the listed country." A negative response to the question on the application form asking whether the applicant did pay directly or indirectly for the merchandise, or intended to do so, if "followed by the certification of truth

Finally, what this Court observed in *United States* v. *O'Brien, supra,* 391 U.S. at 381–382, is equally applicable here: "[B]oth the government interest and the operation of the * * * [statute and regulations] are limited to the noncommunicative aspect of [the] conduct." *United States* v. *O'Brien, supra,* 391 U.S. at 381–382. The court of appeals was therefore correct in upholding the statutory and regulatory licensing system involved here against petitioner's First Amendment challenge.

2. Petitioner also asserts that the Trading with the Enemy Act is, in event, unconstitutionally overbroad.[10]

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printed on the form and the applicant's signature" (Pet. App. 18a–19a), would, the court of appeals stated (Pet. App. 19a), "satisfy the Act and regulations and thereby mandate that the materials be released, unless the Office of Foreign Assets Control possessed contrary information from another source."

[10] The claims that the Act is unconstitutional because it delegates legislative power to the President without fixing standards, and that the regulations must also fall because the President may not, in any event, constitutionally delegate his authority to the Secretary of the Treasury (7 Fed. Reg. 1409) or the Director of Foreign Assets Control (32 Fed. Reg. 3472), have been consistently rejected by the federal courts. See *Teague* v. *Regional Commissioner of Customs, supra,* 404 F.2d at 445; *Sardino* v. *Federal Reserve Bank, supra,* 361 F.2d at 110; *United States* v. *Von Clemm,* 136 F.2d 968 (C.A. 2), certiorari denied, 320 U.S. 769; and see *Campbell* v. *Chase National Bank,* 5 F. Supp 156, 172–174 (S.D.N.Y.), affirmed, 71 F.2d 669, (C.A. 2), certiorari denied, 293 U.S. 592; *Hartmann* v. *Federal Reserve Bank,* 55 F. Supp 801, 804 (E.D. Pa.); *Orrin* v. *Secretary of the Treasury,* D.D.C., Civ. No. 2408–69, decided April 27, 1972; *American Documentary Films* v. *Secretary of the Treasury,* S.D.N.Y., No. 72 Civ. 1711, decided July 5, 1972.

This contention was fully considered by the court of appeals and was properly rejected in its careful opinion on which we rely here (Pet. App. 9a–14a).

We add only the observation that petitioner's suggestion that this Court construe the statute narrowly to apply to the regulation of "commercial transactions only" (Pet. 11) would most likely result in greater, rather than less, interference with First Amendment rights. For, to carve out from the statutory term "property" an exception for all packages containing publications, films, or other literature would require the government to examine the contents of each parcel sent from a hostile country to ascertain whether it should be detained as a "commercial transaction" or released under petitioner's proposed exception. And even as to packages of written material, a separate determination would have to be made as to whether the writings are by nature "commercial" or "non-commercial." Such governmental interference with the free flow of information would be far more offensive, we submit, than the present detention of all packages from specified countries without regard to their content, pending the issuance of a license based on the addressee's certification of the nature of the property and transaction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-81

VETERANS AND RESERVISTS FOR PEACE IN VIETNAM,

Petitioner,

—against—

REGIONAL COMMISSIONER OF CUSTOMS, REGION II and SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents.

PETITIONER'S REPLY BRIEF

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Petitioner,

—against—

Regional Commissioner of Customs, Region II and Secretary of the Treasury of the United States,

Respondents.

PETITIONER'S REPLY BRIEF

The government's brief in opposition to the petition for certiorari treats the facts inaccurately.

It states (Res. Br. 2-3) that the letter notifying petitioner of the detention contained a statement that a Foreign Assets Control license "was obtainable within 90 days of notification." In fact, the letter stated that Customs would retain the publications for a maximum of ninety days while a license was sought. The footnote on page 2 of respondents' brief states that the package was sent by "the principal propaganda organization for the North Vietnamese Government" a fact which, if true, appears nowhere in the record and is hardly a matter of judicial notice.

In footnote 2, page 3, of respondents' brief it is stated that "Mainland China and North Korea, both of which were on the list of designated hostile countries [covered by

the Foreign Assets Control Regulations] when this suit was commenced, have recently been removed from the list." In fact, although many of the restrictions against China were removed on May 7, 1971, North Korea's status remains the same as that of North Vietnam.

Of even more importance, the government asserts (Res. Br. 9) "And the publications are available at 'universities, libraries [and] research and scientific institutions' * * * which are permitted to receive them without restriction as to payment," citing 31 C.F.R. §500.204 App. ¶108. That provision of the Regulations (reproduced in the appendix to the petition for certiorari at 4a) authorizes the issuance of licenses to universities, libraries, research and scientific institutions only "under programs approved by the Librarian of Congress or the National Science Foundation." So far as we have been able to determine, no such programs have ever been set up or approved, and the implication that the publications are easily accessible to members of the public, let alone scholars, is simply not true. Even if such programs existed, the publications would be those selected by the institutions, and their availability at scattered institutions would not justify denying citizens the right to receive them by mail.

At page 10, footnote 9, of its brief the government asserts as a fact that licenses will be granted for publications upon the applicant's bare statement that they are gifts, citing the opinion below. The statement by the Third Circuit, however, was no more than an expression of how the court hoped the Regulations would be administered, without any basis in fact. The Regulations provide that licenses shall be issued for films and publications "when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers," clearly imposing a burden of proof on the

applicant. Foreign Assets Control has adopted that interpretation and requires the furnishing of complete details before issuing such licenses. This was shown in the petition for certiorari in *Teague* v. *Regional Commissioner,* No. 1061, October Term 1968, pages 4, 5, and most recently in *American Documentary Films, Inc.* v. *Secretary of the Treasury,* S.D.N.Y., No. 72 Civ. 1711, decided July 5, 1972 (cited by respondents at page 10 of their brief), where the district court opinion recites at length the efforts of Foreign Assets Control to obtain proof that the subject material constituted gifts despite statements by the applicant that no payment was involved.[1]

In the present case the government did not deny or even qualify petitioner's assertion that the applicant bears the burden of proof that publications are bona fide gifts. It is this record which is before the Court. The government has seized upon dictum of the court below, unsupported by the record or extrinsic facts, to describe its own procedures in a manner contrary to actual practice and contrary to the undenied assertions in the record.

Respondents, following the opinion of the Third Circuit, seek to distinguish *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), relying on the statement in the concurring opinion, 381 U.S. at 308-309, that the statute there in issue was not required by any compelling public interest, while the

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[1] *American Documentary Films* involved the denial of a license to import films from Cuba (affected by the Cuban Assets Control Regulations, 31 C.F.R. Part 515, which are essentially the same as the Regulations here in issue), which Foreign Assets Control apparently suspected were not bona fide gifts. But there the applicant had also sought a license to import posters, which was granted after "The Office of Foreign Assets Control asked a number of questions designed to assist in clarifying the issue of whether or not there would be any direct or indirect commercial benefit to Cuba from the purported transaction." Typewritten opinion, p. 7.

opposite is true of the regulations here in issue (Res. Br. 5-6). Yet the statute challenged in *Lamont,* 39 U.S.C. §4008, was an act of Congress, passed after extensive committee hearings. As such it embodied the national policy of the United States, solemnly and deliberately arrived at. In contrast, the Regulations are no more than the unilateral act of the Secretary of the Treasury. For a court to decide that regulations promulgated by a cabinet member are "more important" than an act of Congress is, we submit, a presumptuous and dangerous approach to relationships between different branches of the government. While the implied premise is that the hostilities in Vietnam justify whatever regulation the Executive Department believes appropriate, the Regulations were equally applicable to China and North Korea, and similar regulations apply to Cuba. It is therefore patent that the only justification for the Regulations is their implementation of a foreign policy which seeks to deny to certain countries the benefits of commercial intercourse. The conflict in Vietnam cannot be the basis for restricting trade with North Korea and Cuba.

The government argues that censorship is not the motivating factor in its restrictions, as all publications are subject to the Regulations, regardless of content. It is surely a matter of notice, however, that unsolicited publications from North Vietnam, China, North Korea and Cuba are far more likely than not to contain political opinion. Censorship is inevitably the result.

The government devotes its principal argument to the applicability of *United States* v. *O'Brien,* 391 U.S. 367 (1968). The broad language of *O'Brien* must be considered in the context of the issue there decided: the burning of a draft card as a form of political protest. To read *O'Brien* as upholding *any* restriction of First Amendment rights

so long as a governmental interest can be found which is "unrelated" to the suppression of those rights would overrule many landmark cases. The anti-littering laws were directed at garbage, not free speech, to cite only one example. Almost any restriction on free speech could easily be cast in terms which made that restriction appear "incidental" to some proper governmental purpose.

But even if the language of *O'Brien* is to be mechanically applied to all situations, it must be applied whole. And an essential ingredient in upholding regulation of speech under *O'Brien* is that "the incidental restriction of alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest," 391 U.S. at 377. The respondents' brief is pointedly silent with respect to the obvious alternative, noted at page 9 of the petition, of relying on the criminal sanctions of the statute, rather than licensing, to prevent payment for publications. The requirement in *O'Brien* that only the least instrusive interference with First Amendment rights is permissible is emphasized by Mr. Justice Harlan's concurrence in which he stressed that other means of expression were available and that an important question would be presented if an "incidental" regulation of speech "has the effect of entirely preventing a 'speaker' from reaching an audience with whom he could not otherwise lawfully communicate," 391 U.S. at 388-389.

The government's brief rejects the suggestion, at page 11 of the petition for certiorari, that the statute be construed to exclude publications, so that constitutional questions might be avoided. It argues that excepting publications from purview of the Regulations would result in greater interference with First Amendment rights, because then all

packages would have to be examined to determine whether they contained publications which are entitled to delivery (Res. Br. 12). Obviously all packages are examined under the existing program, and there would be no greater burden on Customs than under the present program, and a far lesser burden on the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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